



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2004

Mr. Stephen D. Heninger
Fanning Harper & Martinson, P.C.
4849 Greenville Avenue, Suite 1300
Dallas, TX 75206

OR2004-10170

Dear Mr. Heninger:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 213877.

The Sanger Independent School District (the "district"), which you represent, received a request for "all documentation concerning sexual abuse allegations made against" a named district employee. You inform us that some information has been released, but you claim that the remaining information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that Exhibit 12 contains an arrest warrant and supporting affidavit. The 78th Legislature amended article 15.26 of the Code of Criminal Procedure to provide:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26. Thus, article 15.26 of the Code of Criminal Procedure makes the arrest warrant and supporting affidavit that we have marked public. As a general rule, the exceptions to disclosure found in chapter 552 of the Government Code do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, we conclude that the marked arrest warrant and supporting affidavit in Exhibit 12 must be released to the requestor.

We next note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, Exhibits 7 and 8 are part of a completed investigation made of, for, or by the district. Thus, the district must release Exhibits 7 and 8 under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.

You claim that Exhibit 7 is excepted from disclosure under sections 552.103, 552.107, and 552.111. These sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived). As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for purposes of section 552.022. Therefore, the district may not withhold Exhibit 7 under section 552.103, 552.107, or 552.111.

We note, however, that the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Rule 503 of the Texas Rule of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You assert that Exhibit 7 references conferences with the district's attorney. Upon review of the submitted information, we find that Exhibit 7 does not contain or reflect confidential communications among privileged parties. Therefore, none of the information in Exhibit 7 may be withheld under rule 503.

You also claim that Exhibits 7 and 8 are subject to sections 552.026, 552.102, and 552.114. We will therefore address the applicability of these sections to Exhibits 7 and 8, as well as to the other submitted information.

Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act.² See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Having reviewed the information at issue, we find that the information is of legitimate public interest. See Open Records Decision Nos. 329 at 1 (1982) (reasons for an employee’s resignation are not generally excepted from disclosure), 444 at 3 (1986) (legitimate public interest in the activities of public employees in the workplace). We therefore conclude that the district may not withhold any portion of the submitted information under section 552.101 or 552.102(a) on the basis of privacy.

Next you claim that certain information is excepted from disclosure under sections 552.026 and 552.114. The Family Educational Rights and Privacy Act of 1974 (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. See 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in

²Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. However, in this instance, you have asked us to rule on the applicability of sections 552.026 and 552.114.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). For purposes of FERPA, a student's handwritten letters constitute "education records" in that they contain information about identifiable students. See Open Records Decision No. 224 (1979) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). We agree that Exhibit 9 must be withheld in its entirety pursuant to sections 552.026 and 552.114 of the Government Code. We have marked the types of information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA in Exhibits 7, 8, 11, and 12. The remaining information in Exhibits 7, 8, and 11 must be released.

We now consider your claims under sections 552.101, 552.103, 552.107, and 552.111 for the information that is not subject to section 552.022. You seek to withhold the information in the district employee's personnel file submitted as Exhibit 12 under section 552.101 in conjunction with section 21.355 of the Education Code. We will consider this exception for the information in Exhibit 12 other than the arrest warrant and affidavit, which must be released as previously discussed. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* After careful consideration of your arguments and our review of Exhibit 12, we determine that the information at issue relates to allegations of misconduct on the part of an employee of the district and is not evaluative. See generally *id.* at 3 (defining "evaluate"). Thus, we find that the information at issue in Exhibit 12 is not

excepted from disclosure under section 552.101 in conjunction with section 21.355 of the Education Code.

We now consider your claim under section 552.103 for Exhibit 10. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a). To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). The letter submitted in Exhibit 4 provides concrete evidence that the district reasonably anticipates litigation. We also find that the documents submitted in Exhibit 10 are related to the anticipated litigation. Therefore, Exhibit 10 may be withheld in its entirety under section 552.103. Generally, however, once information has been obtained by all parties to the litigation through discovery

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now consider your claim under section 552.107(1) for Exhibit 6. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain that Exhibit 6 consists of confidential communications between attorneys representing the district and employees of the district in furtherance of rendition of legal services during litigation. You state that these communications were intended to be confidential and that their confidentiality has been maintained. After reviewing your arguments and Exhibit 6, we conclude that these records are privileged attorney-client communications that may be withheld under section 552.107(1) of the Government Code.

We now turn to your claim under section 552.107(2) for the information in Exhibit 5. Exhibit 5 responds to the request for pleadings, discovery materials, and orders in a lawsuit *Doe v. Sanger Independent School District* that was filed in state district court and later removed to federal district court. On February 14, 2002, the state district court granted a motion to seal court records and additionally ordered that all unfiled discovery materials were prohibited from being disseminated. *Doe v. Sanger Indep. Sch. Dist.*, No. 2001-50734-367 (367th Dist. Ct., Denton County, Tex., Feb. 14, 2002) (final order on plaintiff's motion to seal court records and motion for protective order). After removal to federal court, the district judge granted a motion to seal court records and further prohibited dissemination of discovery materials. *Doe v. Sanger Indep. Sch. Dist.*, No. 4:02cv196 (E.D. Tex., Oct. 28, 2002) (order on plaintiff's motion to seal court records and motion for protective order). Section 552.107(2) of the Government Code excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." After reviewing the submitted court orders from both state and federal courts sealing the records and forbidding their dissemination, we find that the information in Exhibit 5 must be withheld under section 552.107(2).

We finally note that Exhibit 8 contains a driver's license number and a social security number. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the marked driver's license number in Exhibit 8 pursuant to section 552.130.

Social security numbers may be withheld in some circumstances under section 552.101 or 552.117. Section 552.117(a)(1) excepts from disclosure the social security numbers of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the named employee timely elected to keep his social security number confidential, the district must withhold his social security number in Exhibit 8 pursuant to section 552.117(a)(1).

Additionally, a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994).

These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security number in Exhibit 8 is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the arrest warrant and supporting affidavit in Exhibit 12 must be released pursuant to article 15.26 of the Code of Criminal Procedure. Exhibit 9 must be withheld in its entirety pursuant to sections 552.026 and 552.114 of the Government Code. We have marked the information that must be withheld pursuant to FERPA in Exhibits 7, 8, 11, and 12. Exhibit 10 may be withheld in its entirety under section 552.103. Exhibit 6 may be withheld under section 552.107(1). Exhibit 5 must be withheld under section 552.107(2). The driver's license number in Exhibit 8 must be withheld under section 552.130, and the social security number in Exhibit 8 may be excepted from disclosure under either section 552.117(a)(1) or section 552.101 in conjunction with federal law.⁴ The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

⁴Because we are able to make these determinations, we need not consider your other arguments against disclosure under sections 552.111, 552.135, and the Open Meetings Act.

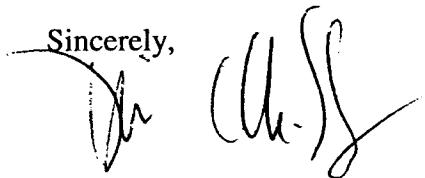
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. McElroy', is written over the word 'Sincerely,'.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/EAS/krl

Ref: ID#213877

Enc. Submitted documents

c: Mr. Tom L. Newton, Jr.
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(w/o enclosures)